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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Michael Stewart,

Plaintiff,

V.

Project 1920, Inc.

Defendant.

Case No. 5:24-cv-00884-PCP

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT AGAINST
DEFENDANT PROJECT 1920, INC**

Action Filed: February 14, 2024

Magistrate Judge: Hon. P Casey Pitts

Date: June 13, 2024

Time: 10:00 am

Location:

Courtroom 8 – 4th Floor

280 South 1st Street

San Jose, CA 95113

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1 **I. INTRODUCTION**

2 Plaintiff Michael Stewart (“*Plaintiff*”) respectfully submits the instant
3 Memorandum in support of his motion for a default judgment against Defendant,
4 Project 1920, Inc (“*Defendant*”) pursuant to Fed. R. Civ. Pro. 55(b)(2). Plaintiff
5 brings this motion by reason of the fact that Defendant was properly served with the
6 Summons and Complaint in this action yet failed to timely appear or otherwise
7 respond to same. As a result, Plaintiff asked the Clerk of the Court to enter a notation
8 of default, which request was granted. Consequently, Plaintiff seeks a default
9 judgment in the total amount of \$15,816. This sum is comprised of the following
10 amounts: (1) statutory damages for direct infringement in the amount of \$10,825.00;
11 (2) attorneys’ fees in the amount of \$4,500.00; and (3) costs in the amount of
12 \$491.00.

13 **II. JURISDICTION AND VENUE**

14 This Court has subject matter jurisdiction over the federal copyright
15 infringement claims pursuant to 28 U.S.C. § 1338(a) and 28 U.S.C. § 1331. This
16 Court has personal jurisdiction over Project 1920, Inc because it maintains its
17 principal place of business in San Francisco County, California. Venue is proper
18 under 28 U.S.C. §1391(a)(2) because a substantial part of the events or omissions
19 giving rise to the claim occurred in this Judicial District.

20 **III. PROCEDURAL POSTURE**

21 Plaintiff commenced this action upon the filing of a Complaint with this Court
22 on February 14, 2024. *Dkt. No. 1*, et seq. The Clerk of the Court issued the requested
23 summons on February 14, 2024. *Dkt. No. 5*. Project 1920, Inc was served with
24 process on February 16, 2024, and proof of such service was filed with the Court
25 that day. *Dkt. No. 8*. As a result, Defendant’s Answer was due on or before March
26 8, 2024.

27 As a result of Defendant’s failure to appear or otherwise respond to the
28

1 Complaint within the time prescribed by Rule 12(a)(1)(A)(ii) of the Federal Rules
 2 of Civil Procedure, Plaintiff filed a request for the clerk to issue a certificate of
 3 default against Defendant on May 12, 2024. *Dkt. No.* 9. The Clerk entered a notation
 4 of default on May 12, 2024. *Dkt. No.* 10. Plaintiff now brings the instant motion for
 5 entry of a default judgment.

6 **IV. PARTIES**

7 Plaintiff Michael Stewart is an individual who is a citizen of the State of New
 8 York and resides in Manhattan, New York.

9 Upon information and belief, Defendant Project 1920, Inc, is a Delaware
 10 corporation with a principal place of business at 441 Jackson Street, San Francisco,
 11 California.

12 **V. STATEMENT OF FACTS**

13 This is an action for copyright infringement. Plaintiff's claims arise from
 14 Defendant's unlawful expropriation and publication of one (1) copyright protected
 15 photograph created by Plaintiff. The facts of this case are set forth at length in the
 16 Complaint filed in this action (*Dkt. No.* 1) as well as in the accompanying
 17 Declaration of Michael Stewart (the "*Stewart Dec.*"). Consequently, for the sake of
 18 judicial economy, the facts are merely summarized herein, for context only.¹

19 Plaintiff is a professional photographer by trade who is the legal and rightful
 20 owner of photographs he authors which he licenses to online and print publications.
 21 Plaintiff has invested significant time and money in building his photograph
 22 portfolio. *Dkt. No.* 1 at ¶¶ 13-14; *Stewart Dec.* at ¶¶ 3, 4. Plaintiff has obtained active
 23 and valid copyright registrations from the United States Copyright Office (the
 24

25 ¹ Since this is a default case, all factual allegations in Plaintiff's Complaint must
 26 be accepted as true, except those relating to damages. *TeleVideo Sys., Inc. v.*
Heidenthal, 826 F.2d 915, 917–18 (9th Cir. 1987) (“The general rule of law is that
 27 upon default the factual allegations of the complaint, except those relating to the
 28 amount of damages, will be taken as true.”).

1 “USCO”) which cover many of Plaintiff’s photographs, while others are the subject
 2 of pending copyright applications. *Dkt. No. 1 at ¶ 15; Stewart Dec. at ¶ 6.* Plaintiff’s
 3 photographs are original, creative works in which Plaintiff owns protectable
 4 copyright interests. *Dkt. No. 1 at ¶ 16; Stewart Dec. at ¶ 5.*

5 Defendant owns and operates a website known as senreve.com (the
 6 “Website”) along with the @Senreve social media accounts on Instagram.com,
 7 Facebook.com, and Twitter.com (the “Accounts”). *Dkt. No. 1. at ¶¶ 3-6.* Upon
 8 information and belief, Defendant monitors the content on its Website and Accounts.
 9 *Dkt. No. 1 at ¶ 42.* Upon information and belief, Defendant has the legal right and
 10 ability to control and limit the infringing activities on its Website and exercised
 11 and/or had the right and ability to exercise such right. *Dkt. No. at ¶ 37.*

12 On May 18, 2023, Plaintiff published a photograph of the American actress
 13 Angelina Jolie (the “Photograph”). *Dkt. No. 1 at ¶ 17; Dkt. No. 1-1; Stewart Dec. at*
 14 *¶ 7.* Plaintiff applied to the United States Copyright Office (the “USCO”) to register
 15 the Photograph and on August 13, 2023, the Photograph was so registered under
 16 Registration No. VA 2-361-925. *Dkt. No. 1 at ¶ 19; Stewart Dec. at ¶ 8.*

17 On August 9, 2023, Plaintiff observed the Photograph on the Website and
 18 the Accounts. *Dkt. No. 1 at ¶ 33; Dkt. No. 1-2; Stewart Dec. at ¶ 9.* The Photograph
 19 was displayed on the Website at URL: <https://www.senreve.com/pages/as-seen-on>.
 20 *Dkt. No. 1 at ¶ 27; Stewart Dec. at ¶ 10.* The Photograph was stored at URL:
 21 https://www.senreve.com/cdn/shop/files/Angelina_Jolie.jpg?v=1684777134.
 22 *Stewart Dec. at ¶ 11.* The Photograph was displayed on the Accounts at URLs:
 23 <https://www.facebook.com/photo/?bid=292292177854831&set=pcv.2922921827854826>,
 24 https://www.instagram.com/p/CstsmuKR0z2/?img_index=1, and
 25 <https://twitter.com/senreve/status/1662159445227634688> (herein referred to as the
 26 “Infringement”). *Dkt. No. 1 at ¶¶ 28-30; Dkt. No. 1-2; Stewart Dec. at ¶ 10.* The
 27 Infringement is an exact copy of the entirety of Plaintiff’s original image that was
 28

1 directly copied and stored by Defendant on the Website and the Accounts. *Dkt.*
2 No. 1 at ¶ 36; *Stewart Dec.* at ¶ 13. As of the date of this motion, the Photograph is
3 still stored on Defendant's Website and posted on the Accounts. *Stewart Dec.* at ¶
4 12.

5 Upon information and belief, Defendant has received a financial benefit
6 directly attributable to the Infringement. *Dkt. No. 1* at ¶ 43; *Stewart Dec.* at ¶ 19.
7 Upon information and belief, the Infringement increased traffic to the Website and
8 Accounts and, in turn, caused Defendant to realize an increase in its revenue. *Dkt.*
9 No. 1 at ¶ 44; *Stewart Dec.* at ¶ 18. Upon information and belief, a large number of
10 people have viewed the unlawful copies of the Photograph on the Website and
11 Accounts. *Dkt. No. 1* at ¶ 45; *Stewart Dec.* at ¶ 20.

12 Plaintiff did not authorize Defendant's use of his Photograph, license
13 Defendant the right to use his Photograph in any manner, nor did he assign any of
14 his exclusive rights in the Copyright to Defendant. *Dkt. No. 1* at ¶ 34; *Stewart Dec.*
15 at ¶ 14. As a result of Defendant's misconduct, Plaintiff has been substantially
16 harmed. *Dkt. No. 1* at ¶ 52; *Stewart Dec.* at ¶ 20. Plaintiff has been deprived of the
17 benefit of his work and copyright, to the extent that Defendant did not purchase a
18 license from Plaintiff to use the Photograph and separately derived profits from the
19 Infringement.

20 On January 16, 2024, Plaintiff, via counsel, served a letter seeking to address
21 the complaints contained herein concerning the Infringement. *Dkt. No. 1* at ¶ 49.
22 Defendant failed to respond, and Plaintiff was forced to seek judicial intervention.
23 *Dkt. No. 1* at ¶ 50.

24 On March 29, 2024, Plaintiff, via counsel, sent an email to various potential
25 email addresses for Defendant notifying it of the Clerk's entry of default and
26 Plaintiff's willingness to discuss a potential settlement. See *Declaration of*
27 *Jacqueline Mandel Attached at ¶ 3(e)*. On April 4, 2024, Plaintiff received a response
28

1 from Coral Chung at coral@senreve.com stating that Defendant was unaware of the
2 lawsuit. *Id.* On April 5, 2024, Plaintiff responded by explaining when and where
3 Defendant was served with a copy of the Complaint and Summons, where the
4 request for default was mailed to, and where the audit letter was sent prior to filing
5 suit. *Id.* Plaintiff again stated his willingness to discuss a potential settlement. *Id.*
6 Plaintiff did not receive any response from Ms. Chung or any other representative
7 from Defendant after this April 5, 2024 correspondence. *Id.* Despite Defendant
8 having been personally served with process and its acknowledgement of the lawsuit,
9 Defendant has failed to respond to the Complaint or otherwise appear in this action
10 and has not removed the Photograph from its Website or Accounts, thereby
11 rendering the Infringement willful.

12 **VI. ARGUMENT**

13 Plaintiff respectfully requests that a default judgment be entered against
14 Defendant, insofar as all of the procedural and substantive requirements have been
15 met to establish Plaintiff's *prima facie* claims.

16 **A. The Procedural Requirements for Entry of a Default Judgment
Have Been Met**

17 The Federal Rules of Civil Procedure ("FRCP") describe a two-step process
18 for the entry of a default judgment. FRCP 55(a)-(b). First, the Clerk of the Court
19 must enter a default where the plaintiff demonstrates that the defendant has failed to
20 plead or otherwise defend the action. FRCP 55(a). Second, following the entry of
21 the notation of default, the Court may enter a default judgment upon application by
22 the plaintiff. FRCP 55(b).

23 In this action, all of the applicable procedural requirements for entry of a
24 default judgment have been satisfied. More specifically, Plaintiff commenced this
25 action upon the filing of a Complaint with this Court on February 14, 2024. *Dkt. No.*
26 1, et seq. The Clerk of the Court issued the requested summons on February 14,
27

1 2024. *Dkt. No. 5.* Project 1920, Inc was served with process on February 16, 2024,
 2 and proof of such service was filed with the Court that day. *Dkt. No. 8.* As a result,
 3 Defendant's Answer was due on or before March 8, 2024.

4 As a result of Defendant's failure to appear or otherwise respond to the
 5 Complaint within the time prescribed by Rule 12(a)(1)(A)(ii) of the Federal Rules
 6 of Civil Procedure, Plaintiff filed a request for the clerk to issue a certificate of
 7 default against Defendant on May 12, 2024. *Dkt. No. 9.* The Clerk entered a notation
 8 of default on May 12, 2024. *Dkt. No. 10.* In light of the foregoing, Plaintiff has
 9 satisfied all procedural requirements so as to entitle him to entry of a default
 10 judgment.

11 **B. The Substantive Requirements for Entry of a Default
 Judgment Have Been Met**

12 As the Ninth Circuit has held, in order for a plaintiff to establish a *prima facie*
 13 claim for copyright infringement, it must simply show: (1) ownership of a valid
 14 copyright; and (2) that the defendant violated the copyright owner's exclusive rights
 15 under the Copyright Act. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

16 In the case-at-bar, Plaintiff has established a *prima facie* claim for copyright
 17 infringement insofar as it has: (i) presented the Court with a valid copyright
 18 registration for the subject Photograph; (ii) presented the Court with proof of
 19 Defendant's reproduction of the Photograph; and (iii) has attested that such
 20 reproduction was without Plaintiff's license, consent, or approval.

21 **C. The *Eitel* Factors Support Entry of a Default Judgment against
 Defendant**

22 A district court considers the following factors (commonly known as the *Eitel*
 23 factors) in determining whether to enter a default judgment: (1) the possibility of
 24 prejudice to the plaintiff; (2) the merits of the plaintiff's claims; (3) the sufficiency
 25 of the complaint; (4) the sum of the money at stake; (5) the possibility of a dispute
 26

1 concerning material facts; (6) whether the default was due to excusable neglect; and
 2 (7) the policy underlying the Federal Rules favoring a decision on the merits. *Eitel*
 3 *v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

4 “The general rule of law is that upon default the factual allegations of the
 5 Complaint, except those relating to … damages, will be taken as true. *TeleVideo*,
 6 826 F.2d at 917-918. The Complaint is reviewed to determine whether the alleged
 7 facts support the requested relief. *Cripps v. Life Ins. Co. of No. Am.*, 980 F.2d 1261,
 8 1267 (9th Cir. 1992). “In applying this discretionary standard, default judgments are
 9 more often granted than denied.” *Philip Morris USA, Inc. v. Castworld Prods., Inc.*,
 10 219 F.R.D. 494, 498 (C.D. Cal. 2003).

11 **i. Plaintiff Will Suffer Prejudice Unless a Default**
 12 **Judgment is Entered**

13 The first *Eitel* factor considers whether the plaintiff will suffer prejudice if a
 14 default judgment is not entered. *Eitel*, 782 F.2d at 920. In this case, if a default
 15 judgment is not entered, Plaintiff will be denied a remedy until such time as
 16 Defendant decides and/or is permitted to participate in this action, which may never
 17 occur. Thus, there is sufficient likelihood of prejudice that weighs strongly in favor
 18 of granting a default judgment.

19 **ii. Plaintiff’s Claims Are Meritorious**

20 The second and third *Eitel* factors require that the plaintiff “state a claim on
 21 which [it] may recover.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).
 22 In this case, Plaintiff’s Complaint pleads facts sufficient, as a matter of law, to
 23 establish that Defendant is liable for direct copyright infringement of Plaintiff’s
 24 copyrighted Photograph in violation of 17 U.S.C. § 501. More specifically, Plaintiff
 25 has presented this Court with a certificate of registration for the Photograph and, as
 26 the Ninth Circuit has held, “[a] copyright registration is “prima facie evidence of the
 27 validity of the copyright and the facts stated in the certificate.” *United Fabrics Int’l*,

1 *Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011). In addition, the
 2 Complaint alleges that Defendant was responsible for the theft, copying and
 3 unauthorized display of Plaintiff's Photograph, and the Court must accept these
 4 allegations as true. *Waters v. Mitchell*, No. C21-0087JLR, 2022 WL 1268169, at *2
 5 (W.D. Wash. Apr. 28, 2022) ("[a]t the default judgment stage, well-pleaded factual
 6 allegations in the complaint, except those related to damages, are considered
 7 admitted and are sufficient to establish a defendant's liability") (citing *Geddes v.*
 8 *United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977)).

9 **iii. The Allegations of the Complaint are Sufficient to**
 10 **Establish Claims of Direct Copyright Infringement**
 11 **and Violations of 17 U.S.C § 1202**

12 The third *Eitel* factor asks the Court to consider whether the allegations of the
 13 Complaint are sufficient to establish an infringement as a matter of law. Here,
 14 Plaintiff has presented proof of authorship of the subject Photograph, together with
 15 proof of registration with the USCO. This satisfies Plaintiff's *prima facie* burden of
 16 proof; *Feist Pubs., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). This
 17 is because under 17 U.S.C. § 401(c), a certificate of registration establishes a
 18 rebuttable presumption of ownership, originality, and validity in the Photograph;
 19 *S.O.S. Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989).

20 As to the second prong—copying of elements of the original work—a plaintiff
 21 must demonstrate "(1) circumstantial evidence of the defendant's access to the
 22 copyrighted work; and (2) substantial similarity between the copyrighted work and
 23 the defendant's work." *Universal City Studios, Inc. v. Film Ventures Int'l, Inc.*, 543
 24 F. Supp. 1134, 1140 (C.D. Cal. 1982).

25 Here, Plaintiff has shown that Defendant clearly had access to the Photograph,
 26 insofar as it had been published by Plaintiff. As to the second element, to say that
 27 there is a "substantial similarity" between the works would be an understatement.

1 Indeed, a side-by-side comparison of Plaintiff's copyright protected Photograph and
 2 Defendant's Infringement will yield a conclusion that they are identical. *Compare*
 3 *Dkt No. 1-1 with Dkt. No. 1-2.*

4 **iv. The Money at Stake Is Not Disproportionately Large**

5 The fourth *Eitel* factor focuses on the amount of money at stake in relation to
 6 the seriousness of the defendant's conduct. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238
 7 F.Supp.2d 1172, 1176 (C.D. Cal. 2002). Under this factor, Courts frequently
 8 evaluate the public's interest in ensuring the integrity of copyright laws by looking
 9 at the severity of the infringers' conduct—where the infringing conduct is severe, a
 10 Court is more likely to award higher statutory damages, as higher awards will deter
 11 such conduct in the future. *Warner Bros. Enter. V. Caridi*, 346 F.Supp. 2d 1068,
 12 1074 (C.D. Cal. 2004). Ultimately, if the sum of money at issue is “reasonably
 13 proportionate to the harm caused by the defendant's actions, properly documented,
 14 and contractually justified, then default judgment is warranted.” *ACS Recovery*
 15 *Servs., Inc. v. Kaplan*, No. CV 09-01304 JSW, 2010 WL 144816, at *6 (N.D. Cal.
 16 Jan. 11, 2010) (internal citations omitted). Further, in a default judgment context,
 17 not only are copyright plaintiffs entitled to elect statutory damages over actual
 18 damages, but in electing such statutory damages “the Court must accept as true
 19 Plaintiff[s'] factual allegations that Defendant [...] acted willfully.” *Rolex Watch*
 20 *U.S.A., Inc. v. Watch Empire LLC*, 2015 WL 9690322, at *4 (C.D. Cal. 2015).

21 Pursuant to 17 U.S.C. § 504(c)(1) and (2), in the context of statutory damages,
 22 the range of a statutory damages award can fall anywhere between \$750 and \$30,000
 23 per work infringed, however, where willfulness is found, such statutory damages
 24 award may be increased to as much as \$150,000. 17 U.S.C. § 504(c)(1)(2). In fact,
 25 even total recoveries (i.e., for multiple infringements, as in the current case) that
 26 have exceeded \$150,000 have been deemed “not proportionately large” for purposes
 27 of this *Eitel* factor. *See Amini Innovation Corp. v. KTY Intern. Marketing*, 768

1 F.Supp.2d 1049 (C.D. Cal. 2011) (finding total recovery of \$151,000 for five claims
2 of copyright infringement not proportionally large given value of works infringed
3 and that “due to Defendant’s lack of participation in this suit, [Plaintiff] has been
4 robbed of the opportunity to actually prove its damages, which may be much larger
5 than statutory damages.”); *see also Rolex Watch U.S.A., Inc.*, 2015 WL 9690322, at
6 *4 (on a default judgment, finding award of maximum statutory damages for each
7 of five infringements “reasonably proportionate to the harm Defendant caused”); *see*
8 *also Getty Images (U.S.), Inc. v. Virtual Clinics*, 2014 WL 1116775, at *2-3 (W.D.
9 Wa. 2014) (in default judgment context, although amounts of infringer’s profits and
10 plaintiff’s lost revenues are uncertain and likely “relatively modest,” the maximum
11 statutory damages award was nevertheless appropriate, given that plaintiff’s images
12 are “particularly subject to adverse commercial consequences when they are
13 infringed because the images lose their exclusivity” and that “the broader impact of
14 infringement on revenue generation supports a heightened statutory damages
15 award”).

16 In this case, Plaintiff is seeking statutory damages in the amount of \$10,825.00
17 (\$2,165.00 for what would have been the licensing fee, multiplied by a factor of five
18 (5) by reason of Defendant’s willful infringement of the Photograph). Plaintiff
19 submits this amount to be reasonable, relatively modest, and proportionate to the
20 harm caused by Defendant, and is also warranted to deter future infringements by
21 this Defendant, as well as other would-be infringers.

22 Here, since Defendant has defaulted, the Court may find that Defendant acted
23 willfully, merely by virtue of its default. *See Globe Ent. & Media, Corp. v. Glob.*
24 *Images USA*, No. 220CV11630CASKSX, 2022 WL 2703845, at *6 (C.D. Cal. July
25 11, 2022) (“[w]here the defendant has defaulted, willful copyright infringement is
26 proven”) (quoting *Microsoft Corp. v. McGee*, 490 F. Supp. 2d 874, 880 (S.D. Ohio
27 2007)).

1 Courts have properly found that where a defendant fails to remove an
 2 infringement after being notified of same, willfulness is established. See, e.g., *Batra*
 3 *v. PopSugar, Inc.*, No. 18-CV-03752-HSG, 2019 WL 482492, at *2 (N.D. Cal.
 4 2019); *Globe Ent. & Media, Corp.*, 2022 WL 2703845, at *6 (citing *Dolman v. Agee*,
 5 157 F.3d 708, 714-715 (9th Cir. 1998)) (willful copyright infringement established
 6 where the defendant has continued to display the infringement despite being
 7 informed it was infringing); *see also Stewart v. Shivley*, No. 1:18-CV-01703-MC,
 8 2019 WL 5589077, at *3 (D. Or. 2019) (finding willfulness where complaint alleged
 9 defendant published photos and omitted attribution to plaintiff as author); *Stross v.*
 10 *Z Lifestyle LLC*, 2020 WL 13556135, at *2, (S.D. Cal. 2020).

11 Here, Plaintiff has similarly established this willfulness in light of Defendant's
 12 appropriation of the Photograph to its Website and Accounts despite actual
 13 knowledge that it is displaying it without a license to do so.

14 **v. The Material Facts have not been Disputed**

15 When a Defendant defaults, all well-pleaded allegations in the Complaint,
 16 except those relating to damages, are accepted as true. *TeleVideo Sys. Inc.*, 826 F.2d
 17 at 917-18. In this case, Plaintiff's Complaint alleges facts necessary to support its
 18 claim for direct copyright infringement, and no dispute has been raised as to the
 19 material allegations in the Complaint.

20 **vi. Defendant's Default was not due to Excusable Neglect**

21 Under the sixth *Eitel* factor, the Court considers whether the Defendant's
 22 default resulted from excusable neglect. Due process requires that interested parties
 23 be given notice of an action and be afforded an opportunity to object before final
 24 judgment issues. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).
 25 Therefore, Plaintiff had no alternative but to commence the action to which
 26 Defendant has strategically defaulted. Further, despite such notice and conversation,
 27 Defendant did not remove the Photograph from the Website.

1 Defendant was served with a true and correct copy of the Summons and
 2 Complaint on February 16, 2024. *Dkt. No.* 8. Plaintiff received no communication
 3 from Defendant.

4 Defendant failed to file an answer or otherwise respond to the Complaint, and
 5 the time within which to do so has expired and has not otherwise been extended.
 6 Therefore, Defendant was given actual notice of the claim before and after
 7 commencement of the litigation. Defendant has chosen to ignore the litigation and
 8 therefore its actions (or inactions) cannot be the product of excusable neglect.

9 **vii. Policy Favoring Decisions on the Merits is not
 10 Applicable**

11 The final *Eitel* factor considers the preference for deciding cases on the merits.
 12 However, “this factor, standing alone, cannot suffice to prevent entry of default
 13 judgment for otherwise default judgment could never be entered.” *Warner Bros.*
 14 *Entm’t Inc.*, 346 F.Supp.2d at 1073. In the instant case, the only reason this lawsuit
 15 cannot proceed is because Defendant, after receiving proper notices, failed to appear.
 16 Accordingly, this factor favors Plaintiff’s Motion for Default Judgment.

17 In summation, the *Eitel* factors weigh heavily in Plaintiff’s favor, and Plaintiff
 18 respectfully requests that the Court grant this motion and enter a default judgment
 19 against Defendant.

20 **D. Plaintiff’s Request for a Default Judgment for Direct
 21 Infringement is Appropriate**

22 For the reasons previously discussed, Plaintiff’s request for a default judgment
 23 for Defendant’s infringements of the Photograph is appropriate and warranted.
 24 Section 504 of the Copyright Act sets forth the damages available to Plaintiff here.
 25 Under Section 504(c), Plaintiff may elect an award of statutory damages of a sum
 26 not less than \$750 or more than \$30,000, as the court considers just. Pursuant to
 27 subsection 504(c)(2), where willful infringement is established, as it is in this case,
 28

1 the Court in its discretion may increase the award of statutory damages of a sum of
 2 not more than \$150,000.

3 Plaintiff has elected to recover statutory damages, insofar as Defendant's
 4 default has rendered it a practical impossibility to identify Plaintiff's actual damages.
 5 Plaintiff has also shown that Defendant's infringement is willful, both by reason of
 6 the default and by reason of Defendant's continued infringement, despite having
 7 been notified of the Infringement and duly served with notice of this action.
 8 Therefore, Plaintiff respectfully submits that a statutory damages award in the
 9 amount of \$10,825.00 is warranted. This award is both proportionate to the damage
 10 incurred by Plaintiff, and sufficient to serve the well-established punitive and
 11 deterrent purpose of these damages.

12 In support, it is respectfully submitted that statutory damages "are recoverable
 13 without regard to the existence or provability of actual damages." *New Form, Inc. v.*
Tekila Films, Inc., 357 F. App'x 10, 11 (9th Cir. 2009). Copyright owners are entitled
 15 to statutory damages for each infringement with respect to any one work. *Peer Int'l*
Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336 (9th Cir. 1990). "[S]tatutory
 17 damages are appropriate in default judgment cases because the information needed
 18 to prove actual damages is within the infringers' control and is not disclosed."
Microsoft Corp. v. Nop, 549 F. Supp. 2d 1233, 1238 (E.D. Cal. 2008). In the current
 20 case, Defendant's failure to participate in this action rendered a determination of
 21 plaintiff's actual damages impossible. Courts in this Circuit and elsewhere have
 22 regarded an award of \$30,000 for similar infringements as appropriate, as in *Globe*
Ent. & Media, Corp. 2022 WL 2703845 and *Curet-Velàzquez v. ACEMLA De P.R.,*
 24 *Inc.*, 656 F.3d 47, 52 (1st Cir. 2011).

25 A statutory damages award within the limits prescribed by Congress is
 26 appropriate "[e]ven for uninjurious and unprofitable invasions of copyright." *New*
Form, Inc., 357 Fed. Appx. at 11 (quoting *F.W. Woolworth Co. v. Contemporary*

1 *Arts, Inc.*, 344 U.S. 228, 233 (1952)). Unlike actual damages, statutory damages
 2 have a punitive purpose “to sanction and vindicate the statutory policy of
 3 discouraging infringement.” *Los Angeles News Service v. Reuters Television Intern., Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (quoting *F.W. Woolworth Co.*, 344 U.S. at
 4 233). Courts regularly award amounts in excess of \$100,000 for default judgments
 5 concerning copyright infringement.² Additionally, the Complaint alleges that
 6 Defendant acted willfully, which allegation of willfulness must be accepted as true
 7 in the context of a default judgment. *Rolex Watch U.S.A., Inc.*, 2015 WL 9690322,
 8 at *4).

9
 10 Plaintiff elects to recover statutory damages in this case. Plaintiff’s copyright
 11 infringement claim qualifies for statutory damages under 17 U.S.C. § 504(c) because
 12 the Photograph was registered with the USCO on April 25, 2016, well before the
 13 Infringement on April 2, 2019. The Court has wide discretion in determining the
 14 amount of statutory damages to be awarded, “constrained only by the specified
 15 maxima and minima.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir.
 16 1984).

17 Here, Plaintiff was denied the right to seek actual damages because Defendant
 18 appropriated the Photograph for its own commercial purpose and then defaulted,
 19 thereby depriving Plaintiff of the ability to prove the benefit Defendant conferred on
 20 itself by stealing Plaintiff’s Photograph. Therefore, the statutory award should be
 21 sufficient to punish Defendant for its brazen theft of Plaintiff’s property.

22 //

23
 24 2 See, e.g., *Amini Innovation Corp.*, 768 F. Supp. 2d at 1058 (awarding
 25 \$150,000 in statutory damages); *Microsoft Corp. v. Nop*, 549 F. Supp. 2d at 1238
 26 (awarding \$970,000 in statutory damages); *Rovio Entm’t Ltd v. Royal Plush Toys, Inc.*, 2014 U.S. Dist. LEXIS 37022, 2014 WL 1153780, at *3 (N.D. Cal. Mar. 20,
 27 2014) (affirming the magistrate judge’s recommendation to award \$700,000 in
 28 statutory damages).

1 **E. Plaintiff Requests an Attorneys' Fee Award**

2 Plaintiff seeks an award of attorneys' fees pursuant to Sections 505 and
 3 1203(b)(5) of the Copyright Act. 17 U.S.C. § 505 in the amount of \$6,110.00. In a
 4 copyright action, it is appropriate for a court to award a prevailing plaintiff
 5 reasonable attorney's fees and costs. *See Frank Music Corp. v. Metro-Goldwyn-*
 6 *Mayer Inc.*, 886 F.2d 1545, 1556 (9th Cir. 1989).

7 The Copyright Act provides, in part: "the court may also award a reasonable
 8 attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. The
 9 Supreme Court has established several principles and criteria to guide the award of
 10 attorney fees under §505. "The statutory language, . . . clearly connotes discretion,
 11 and eschews any precise rule or formula for awarding fees." *Kirtsaeng v. John Wiley*
 12 & Sons, Inc., 579 U.S. 197, 202, 136 S. Ct. 1979, 1985, 195 L. Ed. 2d 368 (2016)
 13 (*quoting Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 114 S.Ct. 1023, 127 L.Ed.2d
 14 455 (1994) ("Fogerty")) (internal quotation marks omitted). "[A] district court may
 15 not award [] attorney's fees as a matter of course; rather, a court must make a more
 16 particularized, case-by-case assessment." *Kirstaeng*, 136 S. Ct. at 1985 *quoting*
 17 *Fogerty*, 510 U. S. 533. (Internal quotation marks omitted).

18 The Supreme Court "noted with approval several nonexclusive factors to
 19 inform a court's fee-shifting decisions: frivolousness, motivation, objective
 20 unreasonableness[,] and the need in particular circumstances to advance
 21 considerations of compensation and deterrence." *Kirtsaeng*, 136 S. Ct. at 1985
 22 (*quoting Fogerty*, 510 U. S. 534, n. 19. (internal quotation marks omitted)). The Court
 23 went on to note that while "[t]here is no precise rule or formula for making these
 24 determinations, but instead equitable discretion should be exercised in light of the
 25 considerations we have identified." *Fogerty*, 510 U.S. 534 (*quoting Hensley v.*
 26 *Eckerhart*, 461 U.S. 424, 436-437 (1983)) (internal quotation marks omitted).

27 "Where a plaintiff has obtained excellent results, his attorney should recover

1 a fully compensatory fee. Normally this will encompass all hours reasonably
 2 expended on the litigation, and indeed in some cases of exceptional success an
 3 enhanced award may be justified.” *Hensley*, 461 U.S. 424, 435 (1983). Further,
 4 “[b]ecause section 505 is intended in part to encourage the assertion of colorable
 5 copyright claims, to deter infringement, and to make the plaintiff whole, fees are
 6 generally awarded to a prevailing plaintiff.” *McCulloch v. Albert E. Price, Inc.*, 823
 7 F.2d 316, 323 (9th Cir. 1987) (internal citations omitted; emphasis supplied); *Berkla*
 8 v. *Corel Corp.*, 302 F.3d 909, 923 (9th Cir. 2002) (“Faithfulness to the purposes of
 9 the Copyright Act is, therefore, the pivotal criterion”); *Historical Research v. Cabral*, 80 F.3d 377 (9th Cir. 1996) (“exceptional circumstances are not a
 10 prerequisite to an award of attorney’s fees”). In this matter, not only is Plaintiff the
 11 prevailing party on his copyright claims, but in this case, the relevant factors strongly
 12 favor an award of attorneys’ fees.
 13

14 Of note, § 505 does *not* condition an award of fees on the showing of a willful
 15 infringement or frivolous suit. *Casella v. Morris*, 820 F.2d 362, 366 (11th Cir. 1987)
 16 (emphasis supplied); *see also Gallagher v. Lions Gate Entm’t Inc.*, No. 2:15-CV-
 17 02739-ODW-E, 2015 WL 6478210, at *2 (C.D. Cal. Oct. 27, 2015) (“the discretion
 18 to award fees and costs does not require an explicit finding of bad faith or
 19 blameworthiness on behalf of the losing party”). Courts should keep in mind the
 20 purpose of the Copyright Act to promote creativity for the public good. *Id.*; *see also*
 21 *Mattel, Inc. v. MGA Entm’t, Inc.*, 705 F.3d 1108, 1111 (9th Cir. 2012) (“The most
 22 important factor in determining whether to award fees under the Copyright Act, is
 23 whether an award will further the purposes of the Act.”).

24 **F. The Non-Exclusive Factors Support an Award of Attorney**
 25 **Fees to Plaintiff**

26 Following the Supreme Court, the Ninth Circuit has held: “In deciding
 27 whether to award fees under the Copyright Act, the district court should consider,
 28

1 among other things: the degree of success obtained on the claim; frivolousness;
 2 motivation; objective reasonableness of factual and legal arguments; and need for
 3 compensation and deterrence.” *VMG Salsoul, Ltd. Liab. Co. v. Ciccone*, 824 F.3d
 4 871, 887 (9th Cir. 2016) (quoting *Maljack Prods., Inc. v. GoodTimes Home Video*
 5 Corp.

6 , 81 F.3d 881, 889 (9th Cir. 1996)). These factors are “not exclusive and need
 7 not all be met.” Fogerty, 94 F.3d at 558; see also *Althouse v. Warner Bros. Entm’t*,
 8 2014 U.S. Dist. LEXIS 194872, at *4 (C.D. Cal. June 17, 2014) (“This list is not
 9 exhaustive, and not every factor must be met in order to grant an award of fees and
 10 costs.”). Although all factors need not be met, all factors support an award of
 attorney fees to Plaintiff as discussed below.

11 i. Degree of Success Obtained

12 Plaintiff obtained complete success on his claims for copyright infringement
 13 for its claim against Defendant for its infringements of Plaintiff’s single work. Thus,
 14 the “degree of success” factor strongly supports an award of attorney fees to
 15 Plaintiff.

16 ii. Frivolousness

17 Because Plaintiff prevailed completely as to all of the copyrighted works at
 18 issue, Plaintiff’s copyright claim is not frivolous as a matter of law. *Unicolors, Inc.*
 19 v. *Kohl’s Dep’t Stores, Inc.*, 2017 U.S. Dist. LEXIS 112576, at *8 (C.D. Cal. Jan. 27,
 20 2017) (“Plaintiff’s suit is obviously not frivolous since it prevails on the merits.”)

21 iii. Objective Reasonableness of Factual and Legal 22 Arguments

23 Similarly, because Plaintiff prevailed completely in his motion for default
 24 judgment as to the copyrighted work at issue, the objective reasonableness of
 25 plaintiff’s factual and legal arguments is also established. *Id.*

26 iv. Motivation

27 Plaintiff’s motivation in bringing suit was to protect his copyrights, prevent

1 Defendant's infringement, and prevent harm to Plaintiff's business. *See Unicolors,*
 2 *Inc.*, 2017 U.S. Dist. LEXIS 112576, at *8-9 ("Plaintiff's motivation in bringing the
 3 suit is its desire to protect its copyright — action consistent with a purpose of the
 4 Copyright Act."); *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d
 5 1065, 1074-75 (D. Ariz. 2006) ("Film Corp.'s motivation is pursuing this litigation
 6 is to protect its copyrights which is one of the objectives of the Copyright Act.").
 7 Plaintiff was also motivated to bring this suit to deter Defendant (and other would-
 8 be infringers) from appropriating his works in the future.

9 **v. Need for Compensation and Deterrence**

10 An award of attorney fees in this matter will further the dual goals of
 11 compensating plaintiff and deterring defendant's conduct. *See Roach v. Tate Publ'g*
 12 & *Enters.*, 2017 U.S. Dist. LEXIS 182884, at *20 (E.D. Cal. Nov. 2, 2017) ("fees
 13 would account for the dual goal of compensating Plaintiff and deterring Defendants'
 14 conduct"); *Oracle United States, Inc. v. Rimini St.*, 209 F. Supp. 3d 1200, 1215 (D.
 15 Nev. 2016) ("court finds that an award of attorneys' fees is appropriate to deter
 16 defendant Rimini from its pattern of infringing Oracle's copyrights, which started
 17 when the business began and continued until the middle of this litigation.");
 18 *Twentieth Century Fox Film Corp.*, 438 F. Supp. 2d at 1075 ("An award of attorneys'
 19 fees would promote the protection of copyrights and further the goal of deterrence,
 20 by encouraging infringement actions for such violations."). "The holder of a
 21 copyright that has obviously been infringed has good reason to bring and maintain a
 22 suit even if the damages at stake are small." *Kirtsaeng*, 136 S. Ct. at 1986. *see also*
 23 *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1432 (9th Cir. 1996) ("we are
 24 particularly concerned that the small award for damages in this case is insufficient
 25 to deter future copyright infringements such as the one at issue here").

26 //

27 //

1 **G. Plaintiff's Fee Request is Reasonable**

2 The Copyright Act provides for awarding “a reasonable attorney’s fee...” 17
 3 U.S.C. § 505. “The most useful starting point for determining the amount of a
 4 reasonable fee is the number of hours reasonably expended on the litigation
 5 multiplied by a reasonable hourly rate.” *Hensley*, 461 U.S. at 433; *United*
 6 *Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 406 (9th Cir. 1990).
 7 “[T]he fee applicant bears the burden of establishing entitlement to an award and
 8 documenting the appropriate hours expended and hourly rates.” *Hensley* at 437.
 9 Although district courts enjoy “wide discretion in determining the reasonableness of
 10 an attorney’s fees,” the court begins from the premise that “[a]ttorney’s fees are based
 11 on the lodestar calculation.” *Perfect 10, Inc. v. Giganews, Inc.*, 2015 WL 1746484
 12 (C.D.Cal March 24, 2015); *Brighton Collectibles, Inc. v. RK Texas Leather Mfg.*,
 13 No. 10-CV-419-GPC WVG, 2014 WL 5438532, at *3 (S.D.Cal. Oct. 24, 2014).

14 “When it sets a fee, the district court must first determine the presumptive
 15 lodestar figure by multiplying the number of hours reasonably expended on the
 16 litigation by the reasonable hourly rate.” *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d
 17 614, 622 (9th Cir. 1993). “This calculation provides an objective basis on which to
 18 make an initial estimate of the value of a lawyer’s services.” *Hensley* at 433.

19 **i. Reasonableness of the Hourly Rates**

20 “The reasonable rate should generally be guided by the rate prevailing in the
 21 community for similar work performed by attorneys of comparable skill, experience,
 22 and reputation.” *Hiken v. DOD*, 836 F.3d 1037, 1044 (9th Cir. 2016) (*quoting*
 23 *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-1211 (9th Cir. 1986)) (*citing*
 24 *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). “The lodestar should be computed
 25 using an hourly rate that reflects the prevailing rate as of the date of the fee
 26 request...” *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016).

1 “To determine a reasonable hourly rate, the district court should consider:
2 experience, reputation, and ability of the attorney; the outcome of the results of the
3 proceedings; the customary fees; and the novelty or the difficulty of the question
4 presented.” *Hiken*, 836 F.3d at 1044 (*quoting Chalmers*, 796 F.2d at 1211) (*citing*
5 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)). “The burden is
6 on the fee applicant to produce evidence that the requested rates are in line with those
7 prevailing in the community.” *Hiken*, 836 F.3d at 1044 (*quoting Camacho v.*
8 *Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008)) (internal quotation marks
9 omitted) (*quoting Blum*, 465 U.S. at 895 n.11). “In general, ‘[a]ffidavits of the
10 plaintiffs’ attorney and other attorneys regarding prevailing fees in the community,
11 and rate determinations in other cases, particularly those setting a rate for the
12 plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.” *Hiken*,
13 836 F.3d at 1044 (*quoting United Steelworkers of Am.*, 896 F.2d at 407). “The
14 prevailing market rate is indicative of a reasonable hourly rate.” *Jordan v.*
15 *Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987); *United Steelworkers*, 896
16 F.2d at 407 (“[R]ate determinations in other cases ... are satisfactory evidence of the
17 prevailing market rate.”).

18 “Generally, the relevant community” for the purpose of determining the
19 prevailing market rate “is the forum in which the district court sits.” *Barjon v.*
20 *Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). Further unless counsel is working outside
21 his or her normal area of practice, evidence that a billing rate was the usual rate the
22 attorney charges for his or her services is evidence that the rate is comparable to the
23 market rate. *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 840 (9th Cir. 1982).

24 Plaintiff’s attorneys herein billed at rates between \$500 per hour and \$750 per
25 hour. Judges in this and other California districts have concluded that rates in the
26 same range as those charged by Plaintiff’s lawyers were reasonable for experienced
27 counsel handling complex litigation. See *Perfect 10, Inc.*, 2015 WL 1746484

1 approving fee award with hourly rates for partners between \$705 and \$930, hourly
 2 rates for associates between \$360 and \$690, and hourly rates for paralegal and
 3 support staff between \$245 and \$345); *Amusement Art, LLC v. Life is Beautiful, LLC*,
 4 2017 WL 2259672 (C.D. Cal. May 23, 2017) (approving fee award with attorney
 5 hourly billing rates between \$450 and \$865, and paralegals and support staff
 6 charging hourly rates between \$215 and \$380); *Armani v. Nw. Mut. Life Ins. Co.*,
 7 2017 WL 3174894, (C.D. Cal. July 24, 2017) (hourly rates of \$675 for partner and
 8 \$450 for associate deemed reasonable in fee award).

9 **ii. Reasonableness of Hours Spent**

10 As discussed below, the reasonable hourly rates sought by plaintiff's counsel
 11 are in-line with the prevailing market rate for other lawyers practicing in the Central
 12 and Eastern Districts of California with similar experience and skill. The rates sought
 13 are below the persuasive (but non-binding) 2017-2018 locality adjusted *Laffey*
 14 Matrix. The rates sought are also materially below the rates recently opined on by a
 15 prominent attorney fee expert in another case involving copyright and trademark
 16 infringement issues. The rates are also in-line with roughly the 60th percentile of the
 17 American Intellectual Property Law Association Report of the Economic Survey
 18 from 2021 and are also below the rates awarded by other Northern and Central
 19 District Court judges. Respectfully, all of the submitted materials clearly support the
 20 following requested rates:

<i>Attorney</i>	<i>Education</i>	<i>Years</i>	<i>Rate</i>
Craig B. Sanders	University of Pennsylvania Law School	30	\$750
Jacqueline Mandel	Capital University Law School	7.5	\$500

21
 22 In determining reasonable hours, the party requesting fees generally submits
 23 its time records justifying the hours claimed to have been expended. *See Chalmers*,
 24
 25

1 796 F.2d at 1210; cf. *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000)
 2 (party requesting fees meets burden “by simply listing his hours and identifying the
 3 general subject matter of his time expenditures”). Plaintiff’s counsel has submitted
 4 detailed time records indicating the amount of time spent on each task, the attorney
 5 performing the task, and the hourly rate charged. Plaintiff’s counsel billed in tenths
 6 of an hour. The time was not “block billed” - that is, the time spent on each individual
 7 task was detailed.

Timekeeper	Position	Hours	Rate	Extended
Craig Sanders	30 th Year Partner	1.8	\$750.00	\$1,350.00
Jacqueline Mandel	7.5 Year Associate	5.3	\$500.00	\$2,650.00
Laura Costigan	Paralegal	1.0	\$125.00	\$125.00
Julie Busch	Paralegal	1.7	\$150.00	\$255.00
Ryan Feldman	Paralegal	.8	\$150.00	\$120.00
Total		10.6		\$4,500.00
Costs				\$491.00

A. Plaintiff Seeks an Award of Costs

In addition to regular taxable costs, allowable costs under section 505 include costs for service of process, depositions expenses, copying, computer assisted legal research, expert witness fees, and travel costs. *See, e.g., Kourtis v. Cameron*, 358 F. App'x 863 (9th Cir. 2009); *ExperExchange, Inc. v. Doculex, Inc.*, No. C-08-03875 JCS, 2010 WL 1881484, at *12 (N.D.Cal. May 10, 2010); *Yue v. Storage Tech. Corp.*, No. C07-05850 JW, 2008 WL 4184915, at *6 (N.D.Cal. Sept.5, 2008); *Trustees of Const. Industry and Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258–1259 (9th Cir. 2006).

Plaintiff respectfully requests a cost award in the amount of \$491.00, comprised of the following: (1) filing fee: \$402.00; and (2) process server fees to serve the summons and complaint: \$89.00. *See Exhibit 1 to the accompanying*

Declaration of Jacqueline Mandel.

VII. CONCLUSION

For all the reasons set forth above, Plaintiff asks the Court to enter a default judgment in the amount of \$15,816 together with any such other and further relief as this Court deems just, equitable, and proper.

DATED: May 7, 2024

Respectfully submitted,

SANDERS LAW GROUP

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